17

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.
No. 882.

BRIEF OF RESPONDENT THE LACLEDE GAS LIGHT COMPANY IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

ROY A. THOMPSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Respondent, The Laclede Gas Light Company.

Of Counsel:
HENRY S. KOLTENBACH, JR.,
EDMONSTONE T. THOMPSON,
705 Olive Street,
St. Louis 1, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CHestnut 4497.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

No. 802.

BRIEF OF RESPONDENT THE LACLEDE GAS LIGHT COMPANY IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States District Court for the Eastern Division of Missouri (R. p. 98) is reported in 57 Fed. Supp. 997. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 206) is reported in 151 Fed. (2d) 424.

STATEMENT OF GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioners assert that this Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1945 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 [49 Stat. 803, 15 U. S. C. A., Sec. 79 (a) et seq.], hereinafter referred to as the Act.

STATEMENT OF THE CASE.

We believe that the issues of this case for the purpose of determination of the question herein involved may be very simply stated and, accordingly, we set forth said statement below.

The Laclede Gas Light Company (hereinafter in this brief called "Laclede Gas"), one of the respondents herein, is a Missouri corporation engaged in the gas utility business within the corporate limits of the City of St. Louis (R. p. 12). Laclede Power & Light Company (hereinafter called "Laclede Electric") is a Missouri corporation organized in 1926, engaged in the electric utility business in the City of St. Louis (R. p. 13). Ogden Corporation (hereinafter called "Ogden"), a registered holding company, is a Delaware corporation which, as of December 31, 1943, owned 73.51% of Laclede Gas' voting securities and 99% of Laclede Electric's voting securities (R. pp. 14-15).

The Plan (R. p. 21) which was finally consummated involved a number of steps which resulted in a reduction in the funded debt of Laclede Gas, changes in its capital structure, the sale of the assets of Laclede Electric to Union Electric Company of Missouri, and the sale by Ogden Corporation of its stock in Laclede Gas, so that the general public became the owner of the stock of Laclede Gas. Among the many provisions of the Plan which brought about the accomplishment of the foregoing, the Plan contained a provision to the effect that the First Mortgage Collateral & Refunding 5½% Gold Bonds (hereinafter called the "1919 Bonds") would be paid at the principal amount thereof, with interest accrued to date of payment, but without any redemption premium. Petitioner claims that it is entitled to the premium. This is the sole issue in the case.

The Securities and Exchange Commission (hereinafter

referred to as the "Commission"), in its Findings and Opinion (R. pp. 42-43), concluded that the retirement of the 1919 Bonds was attributable to the requirements of Section 11 (b) of the Act. The District Court found that this finding was supported by substantial evidence, and that the retirement of the bonds was involuntary (R. p. 132). In view of these findings, it naturally followed that the provisions of the mortgage securing the 1919 Bonds, which called for the payment of a redemption premium, were inapplicable. Since the provisions of the mortgage securing the 1919 Bonds which called for the payment of a redemption premium, were inapplicable, it followed that the provision of the Plan calling for the retirement of the 1919 Bonds at their principal amount without premium was fair and equitable and, accordingly, there was no reason for the Circuit Court of Appeals to disturb the above mentioned findings.

ARGUMENT.

We set out below a specific answer to each of the points made by Petitioner in its brief. However, we wish to point out that, in general, the grounds alleged to exist by Petitioner are inadequate to justify the granting of the writ by this Court. In the case of New York Trust Company v. Securities and Exchange Commission (2nd C. C. A. 1942), 131 Fed. (2d) 274, a plan provided for the dissolution of a registered holding company and payment of its outstanding debentures at the principal amount thereof without premium. Certiorari was applied for and denied by this Court (318 U. S. 786, 87 L. Ed. 1153). Since the plan in that case and the Plan in the case at bar were both enforced by virtue of Section 11 (b) of the Public Utility Holding Company Act, and since the issue in both cases was substantially the same, namely, whether or not a premium was payable, it is difficult to see why certiorari should be granted in the instant case when it was denied in the case of New York Trust Company v. Securities and Exchange Commission, supra.

I.

Petitioner under Part I of its Argument makes the statement (p. 31, Petitioner's Brief) that the decision of the Circuit Court of Appeals for the Eighth Circuit is probably in conflict with applicable decisions of this Court in three different respects. We set out below the three points made by petitioner and separately answer each point.

(1)

Petitioner first makes the following statement (p. 31, Petitioner's Brief): "Possible bankruptcy is not a factor

to be considered in determining what is the fair and equitable equivalent of the rights of bondholders and the Circuit Court of Appeals in holding that possible bankruptcy is a factor to be considered is probably in conflict with the decisions of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123."

It is our position that the granting of a writ of certiorari requires the existence of a real conflict. We do not believe that some statement or finding of a lower court which is mere dicta or which is unnecessary to bring about the final result does in fact give rise to a real conflict. This is well illustrated in the point under discussion. Petitioner quoted one paragraph from the Findings and Opinion of the Commission in which statements were made by the Commission about the possible bankruptcy of Laclede Gas. Petitioner did not quote the following paragraph from said Findings and Opinion (R. p. 46) which reads as follows:

> "The 1919 bonds are speculative in caliber and are rated only C1+ by Standard and Poor's Corporation. The company received only 91.45% of principal amount on the sale of the Series C bonds and 95% on the sale of the Series D bonds, and both series have sold on the markets at prices substantially less than principal amount during most of the intervening years. In 1931 the Series C bonds sold as low as 62 and the Series D as low as 65; as recently as 1940, both series sold as low as 38. Payment of principal amount and accrued interest is adequate compensation for the claims of these bonds in view of the relatively small margins by which the claims are covered, and the substantial risks involved."

Accordingly, it is clear that the Commission took a number of factors into account to determine whether payment of the principal amount without premium was fair and equitable. The mere fact that it may have taken the

possible bankruptcy of Laclede Gas into account as one of those factors does not in our opinion warrant the conclusion of Petitioner that there is a conflict between the instant case and Case v. Los Angeles Lumber Products Co., supra. If it is a conflict, then it is our position that it is not the kind of a conflict which warrants the granting of a writ of certiorari. It would seem to us that the business of this Court would be endless if a writ were granted on this ground.

(2)

Petitioner for its second point makes the following statement (p. 34, Petitioner's Brief): "The refusal of the District Court to resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co. extended to the electric properties and the failure of the Circuit Court of Appeals to reverse the District Court because of such failure is in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523."

There is no merit whatsoever in this point. Nobody has denied that Laclede Gas had sufficient cash to pay the premium without crippling its working capital position. Accordingly, the extent of the lien of the 1919 bonds is completely immaterial and irrelevant to the question of whether or not Laclede Gas should pay the premium on the 1919 bonds, and it follows that there can be no possible conflict with the case of Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523.

(3)

Petitioner for its third point makes the following statement (p. 38, Petitioner's Brief): "The full priority doctrine which has been established by this Court in numerous cases was further misconstrued and misapplied by

the Circuit Court of Appeals in conflict with the decisions of this Court, in that the Circuit Court of Appeals found that 'the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments,' and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100."

Petitioner claims that the Plan was erroneously approved. The Commission found that the payment of the bonds at 100¢ on the dollar was the fair equivalent of the value of Petitioner's rights. Petitioner contends that this conflicts with the full priority decisions of this Court. We submit that there is no conflict whatsoever.

The case of Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, in effect holds that even the express provisions of a security may not necessarily be a standard of fairness and equity where a change occurs as a result of the impact of Section 11 (b). The Court said (l. c. 638):

> "Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. Compare New York Trust Co. v. Securities & Exch. Commission (CCA 2d), 131 F. (2d) 274; Re Laclede Gas Light Co. (E. Mo. D. C., Aug. 25, 1944)."

Under the decision of that case, the provision of a preferred stock certificate providing for a premium on liquidation, whether voluntary or involuntary, was held not to be applicable upon the dissolution of a company under Section 11 (b). It would seem to follow a fortiori that the provision for payment of a premium on the 1919 bonds would not be applicable in the instant case, since under the express provisions of the mortgage an **election** to redeem is necessary. (See statement of Court in the case of In re North Continent Utilities Corporation [D. C.

Del. 1944], 54 Fed. Supp. 527, at page 530.) Accordingly, insofar as the provision with respect to the payment of a premium is concerned, the lower court decisions are not only not in conflict with the decisions of this Court, but are definitely in accord therewith.

Certainly the holding by the Commission cannot be stated to be in conflict with the full priority doctrine. That doctrine merely holds that a senior security holder shall be fully compensated before any allowance shall be made to a junior security holder. The Commission has determined that Petitioner has received such full compensation (R. p. 46), and the lower courts have determined that there is no error in such determination.

It hardly seems necessary to add that the decision of the Commission in the American Power & Light Company case (C. C. H. Federal Securities Law Service, Par. 75,592) is completely irrelevant insofar as the petition for certiorari is concerned. We do not agree that that case is in fact a reversal of the Commission's prior holdings, but irrespective of whether it is a reversal or not, it is certainly not the function of this Court to grant certiorari because a commission has changed a ruling, particularly where the change is in line with what the petitioner for certiorari desires.

II.

Petitioner under Part II of its Argument makes the following statement (p. 54, Petitioner's brief): "The Circuit Court of Appeals has decided four important questions of Federal law arising out of the Public Utility Holding Company Act of 1935 which have not but should be settled by this Court."

Under this ground Petitioner mentions four different questions which are more fully discussed below. Before discussing each question separately, we desire to point out that the function of the writ is to give this Court a chance

to pass upon questions either of great public or great legal importance. The writ of necessity can only be granted in such cases, and cannot be granted to construe every Federal statute and all of the details thereof. If this Court were to attempt to determine all questions arising under the multitude of Federal statutes, it could never physically complete its business. It is our position that the questions termed by Petitioner to be of sufficient importance to warrant the granting of the writ are not in fact of such importance, but are in fact of the type which do not warrant the granting of the writ.

(1)

Petitioner for its first point under this Part II makes the following statement (p. 54, Petitioner's brief): "The Circuit Court of Appeals construed the Standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act authorizing the Securties and Exchange Commission 'to require * * * that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary * * *' as not to apply 'to the details of the plan' and held that that section did not require payment of redemption premiums on the 1919 bonds of Laclede Gas even though Laclede Gas continued as an operating company with sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow, pending court decision."

In the case of New York Trust Co. v. Securities and Exchange Commission, supra, this Court denied certiorari. In the course of the opinion of the Circuit Court of Appeals the Court states at page 275:

> "The petitioners argue that even so the Commission was powerless to find as the subsection required that the payment of the bonds was 'necessary to effectuate

> the provisions of subsection (b).' If there were alternative ways to dispose of the bonds upon dissolution of the issuing corporation . . . obviously Congress gave the Commission the power subject to the review provided for its orders to decide what was necessary in each instance to effectuate the provisions of subsection (b)."

Since this point is substantially the same as the point made by Petitioner under this heading, and certiorari was denied in the case of New York Trust Co. v. Securities and Exchange Commission, it seems clear that certiorari should likewise be denied in this case.

(2)

Petitioner for its second point makes the following statement (p. 58, Petitioner's brief): "The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act to apply 'only to security holders continuing as such in the reorganized corporation' and not to security holders existing in the Company up to the time of the consummation of the reorganization plan."

In our opinion Petitioner misconstrues the holding. In fact, we believe the holding is that security holders may be either present security holders or future security holders. Certainly there is no more warrant for Petitioner's contention that it applies only to present security holders than there would be that it applied solely to future security holders. Whether it applies to present security holders or future security holders or both is not an important Federal question. Certainly Congress could not have had in mind in its general protection of investors that investors as of any particular period of time would be those subject to its protection.

Petitioner reaches the conclusion that, under the reasoning of the Circuit Court of Appeals, there is no change

that the Commission could not effect in the corporate structure of an operating company. We are unable to follow Petitioner's reasoning. We do not see how the holding that the words "security holders" include future security holders brings about this result. In any event, however, the Act clearly contemplates changes in the corporate structure of an operating company if for the purpose of fairly and equitably distributing voting power, and we do not see how an important question of construction is involved in this question.

(3)

Petitioner for its third point makes the following statement (p. 63, Petitioner's brief): "The Circuit Court of Appeals construes Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concludes that, therefore, the 1919 bondholders should be paid nothing above face value and accrued interest."

In the case of New York Trust Co. v. Securities and Exchange Commission, supra, certiorari was denied. We fail to see how the question involved under this ground can be any different in this case than it was in the case of New York Trust Company. We have already pointed out that the decision in this case is in accord with the decision of Otis & Co. v. Securities and Exchange Commission, supra, and it, accordingly, would seem immaterial whether the contract for the payment of premiums was held inapplicable because of dissolution of the company, or because of the impact of Section 11 (b). In any event, the importance of the question would seem the same, and since certiorari was denied in the case of New York Trust Co. v. Securities and Exchange Commission, we can see no ground for plaintiff's argument on this point.

(4)

Petitioner for its fourth point makes the statement (p. 67 Petitioner's Brief): "The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 as required by Section 11 (e) of the Act. The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question."

Section 24 (a) of the Act provides in part that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Section 24 (a) by its terms is applicable to a review of a decision in the Circuit Court of Appeals rather than to an enforcement proceeding under Section 11 (e) of the Act. The substantial evidence rule required by Section 24 (a) should be equally applicable to Section 11 (e). Certainly this Court has taken the position in many decisions that the findings and conclusions of commissions shall not be disturbed if they are supported by substantial evidence. We believe that Petitioner has confused certain decisions with respect to bankruptcy cases with the general rule prevailing with respect to review of commission decisions, and has completely ignored Section 24 (a) of the Act.

This Court made the following statement in Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 590, l. c. 602:

> "We held in Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 86 L. ed. 1037, 62 S. Ct. 736, supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' Id. 315 U. S. p. 586, 86 L. ed. 1049, 62

S. Ct. 736. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Id. p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. Cf. Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287, 304, 305, 314, 77 L. ed. 1180, 1191, 1192, 1197; West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 70, 79 L. ed. 761, 768, 55 S. Ct. 316; West v. Chesapeake & P. Teleph. Co., 295 U. S. 662, 692, 693, 79 L. ed. 1640, 1657, 1658, 55 S. Ct. 894 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Teleph. & Teleg. Co., 212 U. S. 414, 53 L. ed. 577, 29 S. Ct. 357; Lindheimer v. Illinois Tel. Co., supra (292 U. S., pp. 164, 169, 78 L. ed. 1191, 1193, 54 S. Ct. 658); Railroad Commission v. Pacific Gas & E. Co., 302 U. S. 388, 401, 82 L. ed. 319, 326, 58 S. Ct. 334."

We believe this statement indicates the general attitude of this Court with respect to commission findings, and certainly it cannot be said that there is an important Federal question left undecided and requiring action of this Court in view of the general law and the many holdings of this Court on the general subject.

III.

Petitioner states in Part III of its Argument that "the holding of the Circuit Court of Appeals that the Order of the Commission of May 20, 1943, is final, is in conflict with decisions by Circuit Courts of Appeal for the Second and Third Circuits" (p. 74, Petitioner's brief).

Petitioner further states (p. 79, Petitioner's brief) that "the Court of Appeals and the District Court below hold that the Petitioner cannot raise objections in an enforcement proceeding, because the order of May 20, 1943, was unappealed from and became final," and that this "holding is in direct conflict with holdings in both the Second, Third and Sixth Circuits." There was in fact no such holding, nor did Petitioner ever attempt to review the order of May 20, 1943. Petitioner did in fact raise objections in this proceeding, which is an enforcement proceeding, and has had full opportunity to object to the payment of the 1919 Bonds at the principal amount thereof without premium.

The description by the District Court of the Commission Order of May 20, 1943, as final since unappealed from, and the approval of that description by the Circuit Court of Appeals in the instant case are in the nature of obiter dictum and are not necessary to the Courts' holdings. The question before the District Court was whether the plan before the Court and in the particular objected to was an involuntary one. The terms of the mortgage provided for payment of the premium "If the Company shall elect to redeem any of the bonds * * *" (R. p. 121). The District Court found "no basis for overruling the findings of the Commission that the Plan now before the Court and in the particulars objected to is an involuntary plan submitted under legal compulsion to comply with the mandate of the Act and the ruling of the Commission" (R. p. 118). The Court based this finding on the Conclusion of Law that the

retirement of the bonds was attributable to Section 11 of the Act and hence not voluntary (R. p. 133). It reached this Conclusion of Law through several lines of reasoning. It held that the compulsion of the Commission's Order of May 20, 1943, which Order it found had become final (R. p. 110), rendered the Plan involuntary. It found that Ogden's plan, submitted as predecessor of Utilities Power & Light Company, was not voluntary but pursuant to the legal compulsion of the direction of the Commission and a Federal court, and held that plan inseparable from Laclede's plan (R. p. 112). It ruled that the retirement of the bonds was necessitated by the compulsion of the Commission's Order to Ogden to dispose of its holdings in Laclede Gas and Laclede Electric (R. p. 112). It found that the retirement of the bonds was necessary to implement Ogden's divestment of its interests in Laclede Gas and Laclede Electric by rendering their securities and property salable (R. p. 113-114). It held that the Plan was involuntary because of the compusion of the Act (R. p. 117).

The District Court phrased the question "* * * if retirement of 1919 bonds results from legal compulsion, the condition upon which payment of the premium becomes due under the bond or mortgage contract does not exist" (R. p. 113). It held that the Plan was involuntary, having been submitted under legal compulsion, and the retirement of the bonds was compelled legally, and hence not an election by the Company to redeem the bonds. Therefore, the District Court's decision of the finality of the Commission's Order of May 20, 1943, is not decisive since, as has been demonstrated, there was other ample basis for the Court's findings that the Plan was involuntary, having been submitted under legal compulsion. The Circuit Court of Appeals in affirming the District Court's decision accepted the same bases for finding that the retirement of the bonds under the Plan was involuntary. The question

of whether the Commission's Order of May 20, 1943, was final was not decisive in either Courts' finding of the existence of legal compulsion. .

Petitioner is not objecting to the substance of Commission's Order of May 20, 1943; it objects solely to the Courts' statements that the Order had become final. Since, as has been demonstrated, these statements are not decisive in the instant case, then the question of the final or interlocutory nature of the Order was not the compelling factor in the Courts' decisions, and hence not a source of conflict among the decisions of the Circuit Courts of Appeal.

Furthermore, we do not believe there is in fact a conflict between the instant case and those cases cited by Petitioner in part III of its brief. We do not think a full discussion of this question would be helpful to this Court since it is clear, as pointed out above, that the order of May 20, 1943 only has importance as one of the several factors bringing about the finding that the payment of the 1919 bonds at the principal amount thereof without premium was involuntary rather than voluntary.

Petitioner might properly say there was a conflict if some other Circuit had determined on a substantially similar state of facts that the premium must be paid. However, that is not the case, for in both the case of New York Trust Company v. Securities and Exchange Commission, supra, Second Circuit, and the case of City National Bank & Trust Company of Chicago v. Securities and Exchange Commission, 7 C. C. A. (1943), 134 Fed. (2) 65, the Circuit Courts upheld plans as fair and equitable which called for payment of the principal amount of the bonds in question without premium.

CONCLUSION.

In conclusion, we submit that the decision of the Circuit Court of Appeals is in accord with the applicable decisions of this Court; not in conflict with the decisions

of the courts of other circuits; and that the questions determined by the Circuit Court of Appeals, which have not heretofore been passed upon by this Court, are not of sufficient importance to warrant this Court granting a writ of certiorari.

Respectfully submitted,

GUY A. THOMPSON,
705 Olive Street,
St. Louis, Missouri,
Attorney for Respondent, The Laclede
Gas Light Company.

Of Counsel:

HENRY J. KALTENBACH, JR.,
EDMONSTONE F. THOMPSON,
705 Olive Street,
St. Louis, Missouri.